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No. 74-1233

In the Supreme Court of the United States

OCTOBER TERM, 1974

CLIFFORD T. GREEN, VALERIANO SUAREZ, and HENRY FORT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CLIFFORD T. GREEN, VALERIANO SUAREZ, and HENRY FORT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Clifford T. Green, Valeriano Suarez and Henry G. Fort, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 27, 1975, affirming the Judgment of conviction previously entered in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The judgment of the District Court is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is reproduced as an Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on February 27, 1975. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a physician, who is duly registered under the Controlled Substances Act, is liable to the penalty provisions of Title 21, United States Code, Section 841.

2. Whether a pharmacist, acting as agent of a duly registered pharmacy, can be liable for the penalty provisions of 21 U.S.C. 841 if he dispenses controlled substances sold within his regular course of business at the pharmacy.

3. Whether Title 21, Code of Federal Regulations, Section 306.04(a), invalidly expands the scope of coverage of Title 21, United States Code, Section 841(a)(1).

4. Whether the evidence was sufficient to convict defendant Fort of conspiracy solely on the theory that the accused had knowledge that illegal activities were occurring in his building.

STATEMENT OF THE CASE

In March, 1973, Dr. Valeriano Suarez, Dr. James McClure, Clifford T. Green, and Henry G. Fort, were indicted for conspiracy to violate Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 846. There were also a number of substantive counts charging Suarez, McClure and Green with individual violations of 21 U.S.C. 841(a)(1). This indictment was dismissed on the government's own motion while under attack for insufficiency.

A superseding indictment was returned in June, 1973, which was virtually identical to the March indictment with the addition of violations of Title 21, Code of Federal Regulations, Section 306.04(a) being charged in conjunction with the violations of 21 U.S.C. 841(a)(1).

The facts which led to the indictment were that Dr. Suarez ran a medical clinic in a building owned by defendant Fort. Defendant Green was a pharmacist who, along with Fort, owned a pharmacy on the same floor of the building as Dr. Suarez's clinic. Dr. McClure worked part-time at the clinic.

Both doctors, the pharmacy and the pharmacists had all federal and state registrations and certifications to dispense controlled substances required by law.

The two doctors were charged with issuing prescriptions for controlled substances outside of the course of their professional practices and without legitimate medical purposes. Green was charged with filling these prescriptions with knowledge of their nature. Fort was charged with the others with conspiracy to dispense controlled substances in violation of 21 U.S.C. 841(a)(1) and 21 C.F.R. 306.04(a).

After a trial by jury, Dr. Suarez was found guilty of conspiracy, seventeen substantive counts, and not guilty of one count. Clifford Green was found guilty of conspiracy and ten substantive counts, and Henry Fort was found guilty of conspiracy. Dr. McClure was found not guilty of the charges against him. Dr. Suarez was sentenced to five years imprisonment, Clifford Green to three years, and Henry Fort to one year.

The convictions were affirmed by the Court of Appeals for the Seventh Circuit on February 27, 1975. No Petition for Rehearing was filed.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS ON THE APPLICABILITY OF TITLE 21, UNITED STATES CODE, SECTION 841(a).

In affirming the convictions of appellants Suarez and Green, the Court of Appeals for the Seventh Circuit expressly declined to follow the majority holding of the Court of Appeals for the District of Columbia Circuit in the case of *United States* v. *Moore*, 505 F.2d 426 (D.C. Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (February 18, 1975). Thus, there is a conflict between two courts of appeals on decisions which were rendered on the same matter; the case then falls squarely within United States Supreme Court Rule 19(1)(b), 28 United States Code.

That the decisions were rendered on the same matter is undeniable. The facts in the instant case and the facts in *Moore* are almost identical. Defendants Moore and Suarez were both doctors who practiced in poverty-ridden and crime-infested urban neighborhoods. Both had massive patient loads of which a sizable portion was made up of self-proclaimed narcotics addicts. Both doctors prescribed large amounts of controlled substances to their patients. Each doctor defended his actions as being treatment for addiction.

Both doctors were convicted of violating Title 21, United States Code, Section 841(a), and Title 21, Code of Federal Regulations, Section 306.04(a).

On appeal each doctor argued that the section of the Controlled Substances Act under which he was convicted was not applicable to physicians registered to dispense controlled substances. Dr. Moore's conviction was reversed in the D.C. Circuit; Dr. Suarez's conviction was affirmed in the Seventh Circuit.

II.

THE REASONING OF THE DISTRICT OF COLUMBIA CIRCUIT IN MOORE IS SUPERIOR TO THE SEVENTH CIRCUIT'S REASONING AS APPLIED TO THE FACTS OF THE INSTANT CASE.

The split among the circuits on virtually identical facts and legal issues needs resolution. As applied to these facts, the Court in *Moore* presented reasoning and research which is far more persuasive and impressive than that which is found in the opinion in the instant case.

Chief Judge Bazelon's opinion in *Moore* was based on a thorough search of the legislative history of the relevant portions of the Controlled Substances Act, 505 F.2d at 429-430. By distinguishing the present act from the provisions of its predecessor, the Harrison Narcotics Act of 1914, the majority opinion in *Moore* exhibited an insightful and internally consistent determination of the intent of Congress in passing the registration provisions and related penalties of the Act. The conclusion reached in *Moore* was that Congress intended errant registrants to be covered by the penalty provisions of 21 U.S.C., Sections 842 and 843, while Section 841 would be applicable only to those persons who dealt in controlled substances outside of the regulated channels of distribution. Thus, a physician who writes prescriptions for drugs in a manner other than that permitted by his registration will be sub-

ject only to the penalties of Sections 842 and 843 which serve to back up the close and complete administrative regulation of registrants.

In contrast to the well-reasoned majority opinion in *Moore,* the court in the instant case began declaring that a registrant who does what was done here ". . . should be treated like . . . any street-corner pill-pusher". (slip opinion, p. 9). The court then proceeded to make the law treat registrants the way it felt that they should be treated. Unfortunately the court accomplished this feat by arbitrarily determining that Congress did not mean to do what it did when it enacted specific penalty provision for registrants under the Act. Rather, the court said, in effect, that Section 841 must be applied liberally to encompass those authorized by law to distribute controlled substances as well as those not so authorized. This in spite of the fact that registrants were given their own set of penalties under the Act. Thus, the Seventh Circuit Court of Appeals chose to ignore the legislative history and interpreted the law on the basis of what it presumed Congress must have wanted.

III.

THE COURT OF APPEALS ERRED IN TREATING THE PHARMACIST DEFENDANT IN EXACTLY THE SAME MANNER AS THE PHYSICIAN DEFENDANT.

Defendant Green, the pharmacist who filled the bulk of Dr. Suarez's prescriptions, was mentioned specifically only once by the Court of Appeals. That referral came in a footnote which, in effect, held that pharmacists are to be treated in exactly the same manner as physicians in reference to violations of the Controlled Substances Act. (slip opinion, note 12, page 8).

However, there are substantial differences between the status of a doctor and that of a druggist which will not

permit a blanket treatment of the two professions in this matter. The Court of Appeals was wrong in its assumption that Title 21, United States Code, Section 822, requires pharmacists to register in order to distribute controlled substances. Rather, as was brought out at trial, it is the pharmacy which must be registered, 21 U.S.C. 823(f), and the pharmacist need not be, 21 U.S.C. 822(c)(1).

Thus, the holding in *Moore* is not directly applicable to pharmacists. But this also means that the penalty provisions of 21 U.S.C. 842 and 843 are not applicable to druggists and, as held by the court, Section 841 is applicable.

The trouble with this conclusion is that the terms of Section 841 exempt pharmacists when read in conjunction with Sections 822 (c)(1) and 823(f). Also relevant is the definitional section, 21 U.S.C. 802(20), which includes "pharmacy" but not "pharmacist" under the heading "practitioner".

It is undisputed that a registered pharmacy may dispense controlled substances pursuant to valid prescriptions. It is also undisputed that each of Dr. Suarez's prescriptions was valid on its face. Thus, the issue in regard to pharmacists concerns the extent to which a pharmacist must go beyond the prescription and delve into the motives of the dispensing physician.

If a pharmacist has reason to believe that a prescription, valid on its face, was issued for other than a legitimate medical purpose, what is he required to do in order to avoid criminal liability? The statute offers no guide, nor do the federal regulations. Thus, the defendant-pharmacist was authorized by the subchapter to dispense controlled substances; no place in the subchapter is that authorization

limited. Section 802(20) refers to "course of professional practice," but does not refer to pharmacists.

This can lead to one of two conclusions: 1) any time a pharmacist fills a prescription for a controlled substance he is violating Section 841(a) or 2) a pharmacist cannot violate the section so long as there is a facially valid prescription so that there is no violation of 21 U.S.C. 829.

IV.

THE REGULATION UPON WHICH THE INDICTMENT WAS BASED INVALIDLY EXPANDED THE RANGE OF PROSCRIBED ACTIVITIES OF 21 U.S.C. 841(a)(1).

The indictments against all three defendants charged violations of Title 21, United States Code, Section 841(a)(1) and Title 21, Code of Federal Regulations, Section 306.04(a). The regulation was promulgated by the Attorney General to define and clarify the proscriptions of the statute.

However, this particular regulation went far beyond that. While that statutory language spoke only in terms of dispensing drugs "in the course of professional practice", 21 U.S.C. 802(20), the regulation defines valid dispensation as "for a legitimate medical purpose". While the statutory language only requires that the doctor be acting as a doctor in dispensing the prescriptions, the regulatory language requires that the prescriptions be for drugs which are accepted medically for treatment of the particular ailment. Thus, where, as in this case, expert medical testimony was presented by the prosecution on the value of certain drugs as treatment for narcotics addiction, the issue being resolved by this testimony is "legitimate medical purpose", not whether or not the prescriptions were issued "in the course of professional practice". This

can lead, as it did here in great degree, to a doctor who prescribes unorthodox medications in the belief that they will be effective being convicted of unlawful dispensing of controlled substances.

Further, in reference to petitioner Green, it is only in 21 C.F.R. 306.04(a) that the duty of the pharmacist is declared. Thus it was the Attorney General and not Congress who determined that the non-registered pharmacist has the same duties as the registered physician and is subject to exactly the same sanctions. The authorizations of 21 U.S.C. 821 and 871(b) do not give the Attorney General the power to determine what is and what is not criminal conduct.

As a result of the inclusion of the regulation in the indictment, the petitioners may very well stand convicted of a crime which was never created by Congress.

V.

REGARDLESS OF THE LIABILITY OF THE PHYSICIAN OR PHARMACIST, THE EVIDENCE WAS INSUFFICIENT TO CONVICT HENRY FORT.

There was no direct evidence that Petitioner, Henry Fort, agreed with anyone to violate Title 21, United States Code, Section 841(a)(1). While it is not disputed that a defendant can be convicted of conspiracy based wholly on circumstantial evidence, the evidence presented against Henry Fort falls far short of that required to find him a member of a conspiracy beyond a reasonable doubt.

The evidence against this petitioner can be summarized as follows: He was the owner of the building in which the medical center and pharmacy were located. Petitioner hired guards to patrol the building. He owned half the stock in the pharmacy and was one of its officers. He approved of and encouraged the use of a private phone line

between the clinic and the pharmacy and applied for registration as an apprentice pharmacist.

On the other hand, Henry Fort never issued a prescription, nor did he ever fill a prescription. The closest he ever got to a controlled substance was manually taking tablets out of a large bottle and counting them into smaller bottles.

This evidence is far more consistent with the acts of a businessman and property owner concerned with getting the maximum lawful return from his investments than is it of a member of a conspiracy to dispense drugs illegally.

As the owner of a building in a disadvantaged area it is certainly reasonable to hire guards to protect the property. It is more than reasonable in view of the fact that the medical center in the building was often congested with patients whose conduct was far from exemplary. Indeed, it would have been lax of petitioner had he not hired a guard for the building.

One of the guards was stationed permanently on the eighth floor of the building. This assignment is reasonable since the medical center, the source of most activity and potential for misconduct, was located on that floor.

Two of the duties of the eighth floor guard were to check persons entering the pharmacy for prescriptions and to report to the pharmacist on the number of persons waiting for treatment at the medical center. Since Fort was wearing two hats at this time—building owner and pharmacy owner—charging the guard with these duties can imply no nefarious purpose. The Afro-American Pharmacy was a "prescription" pharmacy, thus patrons would be expected to have prescriptions when entering. A guard to turn away persons without prescriptions would serve to reduce congestion on an already crowded floor.

Further, a periodic check of the clinic's waiting room made sense because the pharmacy drew most of its patrons directly from the clinic. If the clinic was empty there was little reason for the pharmacy to remain open. Having the guard rather than the pharmacist go across the hall to make the checks was for the convenience of the latter.

The most damaging evidence against petitioner was the direct phone between the clinic and the pharmacy which he knew of and encouraged. There is nothing illegal about such activity. Since Fort asked legal advice from an attorney on this matter, it is apparent that he wanted to be sure that nothing done would be against the law. Once the phone line was installed, it is reasonable that the owner of the pharmacy would want to get the maximum use out of it in order to increase the revenue of the business.

Since Fort is neither a pharmacist nor a doctor, he could not be charged in any of the substantive counts as the indictment was drawn. And, since Dr. Suarez and Dr. McClure were writing the prescriptions and pharmacist Green was filling the prescriptions, it is imperative to ask the following question—what essential and otherwise missing ingredient was Fort contributing to the conspiracy? The answer to that question is—nothing. The Conspiracy as alleged by the Government, with or without the inclusion of petitioner, would run in exactly the same manner. Henry Fort could bring nothing to it.

Thus, taking all the evidence as a whole, the picture is one of a concerned businessman and property owner anxious to improve his financial position and that of the business in which he was a stockholder. Little was shown to indicate that petitioner had any knowledge of illegal events at the building and, if any crimes were committed

at the site, it appears that Henry Fort took all reasonable steps to prevent them.

The government's theory—that if Henry Fort knew what was going on he must have been involved in it—is legally insufficient. It is certainly the law that ". . . mere knowledge, approval or acquiescence in the object of the conspiracy, without an agreement to cooperate in achieving such object and purpose, does not make one a party to a conspiracy." *United States* v. *Downen,* 496 F.2d 314, 319 (10th Cir. 1974).

Of course, if the convictions of Dr. Suarez and Clifford Green are reversed, the conviction of Henry Fort must also be reversed. Since neither a registered physician or pharmacist in a registered pharmacy could violate 21 U.S.C. 841(a)(1) in the manner charged in the indictment, the "conspiracy" to violate that section could not have occurred since only Fort, the inactive conspirator, was legally capable of being guilty of the offense. Needless to say, a one man conspiracy cannot exist.

Wherefore, for the foregoing reasons, the Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 74-1428, 74-1433, 74-1435
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLIFFORD T. GREEN, VALERIANO SUAREZ and HENRY G. FORT,

Defendants-Appellants.

and

Nos. 74-1420, 74-1468
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAY MING LEU,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 73 CR 420 and No. 74 CR 343

PHILIP W. TONE and FRANK J. McGARR, Judges.

ARGUED JANUARY 6, 1975 — DECIDED FEBRUARY 27, 1975

Before FAIRCHILD, *Chief Judge*, STEVENS and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* These consolidated appeals raise the same principal issue: whether indictments against

physicians and a pharmacist (registrants under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*) for the dispensing or distributing of controlled substances pursuant to prescriptions allegedly issued without a legitimate medical purpose or outside the usual course of professional practice, properly charge crimes under 21 U.S.C. § 841(a) [1] and 21 C.F.R. § 306.43(a). [2]

I

In 74-1428, et al., the defendants below were: Valeriano Suarez, a physician who practiced at the Central West Medical Center located on the eighth floor of a building at 2400 West Madison, Chicago, Illinois; James McClure, a physician who assisted Dr. Suarez on a part-time basis at

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[1] 21 U.S.C. § 841 provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .

[2] 21 C.F.R. § 306.04 provides:

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances. . . .

the medical center;[3] Clifford T. Green, a pharmacist and part-owner of the Afro-American Pharmacy located across the hall from the medical center and Henry G. Fort, part-owner of the pharmacy and owner of the building.

In June 1973, a grand jury returned a 33 count indictment against the defendants.[4] Count I charged that a conspiracy existed beween the defendants to dispense controlled substances pursuant to prescriptions which would be issued without a legitimate medical purpose and to distribute controlled substances pursuant to prescriptions which they knew to be issued neither in the usual course of professional treatment nor for a legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1) and 21 C.F.R. § 306.04(a).

In addition to the conspiracy count, 27 of the remaining 32 counts are on appeal.[5] Seventeen substantive counts

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[3] Dr. McClure was found not guilty by the jury and accordingly is not presently before this court.

[4] Originally there had been a 30 count indictment against the four defendants. This was dismissed on the government's own motion and superseded by the present indictment.

[5] Count 2 indicted Green for knowingly and intentionally furnishing a material false statement to the Registration Branch of the Bureau of Narcotics and Dangerous Drugs. This count was severed and eventually dismissed by the government after Green's conviction.

Count 9 charged Dr. Suarez with dispensing a Schedule III controlled substance without a legitimate medical purpose. He was found not guilty of this count.

Counts 31-33 indicted Dr. McClure for illegally dispensing Schedule III controlled substances without a legitimate medical purpose. These counts are not before us.

charged Dr. Suarez for knowingly and intentionally dispensing on or about specified dates Schedule II and III controlled substances without a legitimate medical purpose,[6] and ten substantive counts charged Green for knowingly and intentionally distributing on or about specified dates Schedule II controlled substances pursuant to prescriptions which he knew were issued neither in the usual course of professional treatment nor for a legitimate medical purpose.[7] The controlled substances which constitute the basis for the bulk of the charges are: Ritalin, Desbutal, Doriden, and Tuinal.[8] After a jury finding of guilty, Suarez was sentenced to five years, Green to three years and Fort to one year imprisonment. In addition, all were given special parole terms of two years.

Numerous individuals, some of whom were government agents, testified that they would come to the medical clinic, receive minimal, if any, professional medical treatment and would be given upon request one or more prescriptions, either in their own or a fictitious name, for substances

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[6] Counts 3-8, 10-13, 18, 20, 21, 24-27. All but Counts 5 and 7 alleged dispensing of Schedule II controlled substances.

[7] Counts 14-17, 19, 22, 23, 28-30.

[8] The government offered the following description for these substances:

RITALIN—a trade name for a tablet containing methylphenidate, a Schedule II controlled substance.

RESBUTAL—a trade name for a capsule containing methamiphetamine, also a Schedule II controlled substance.

DORIDEN—a trade name for capsules or tablets containing glutethmide, a Schedule III controlled substance.

TUINAL—a trade name for tablets or capsules containing sodium amoborbital and sodium secoborbital, also a Schedule III controlled substance.

described in the indictment. They would then proceed across the hall and have their prescriptions filled without questioning by defendant Green. Some witnesses testified to coming in once a week under different names and receiving prescriptions on each occasion. This was supported by medical files which contained more than one name on them. There was also evidence that there were names of famous individuals[9] appearing on prescriptions for controlled substances written by Dr. Suarez and filled at the Afro-American Pharmacy. These individuals neither received the controlled substances prescribed nor were medical files containing their names found at the medical center.

Other corroborating evidence of wrongdoing by the defendants included the existence of the no refill for fifteen days rule established by Dr. Suarez. Most patients, who paid $10 per visit, were given prescriptions that would last them fifteen days. Jackie Hunter, receptionist and office manager of the clinic, testified that there were certain preferred patients who did not have to abide by the "fifteen day rule" and who could usually purchase multiple prescriptions. Ms. Hunter also testified that she overheard a conversation where Green was cautioning Dr. Suarez about prescribing too much medication for a particular individual. There was also evidence that a direct telephone line was set up from Dr. Suarez' office to the pharmacy owned by Green and Fort. Ms. Hunter testified that Green and Fort complained that Suarez was not using the telephone often enough to call prescriptions directly in, and

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[9] Such names as Lana Turner, Mark Twain, Spencer Tracy, Loretta Young, Joan Crawford, Ralph Nader, Karl Malden, Peter Fonda, Peter Lorre, Lena Horne, Carl Stokes, Celeste Holm, Lawrence Welk, Aretha Franklin, Rosalind Russell, and Pablo Casales.

that because of this sales were being lost to other pharmacies. Finally, Fort and Hunter had a guard placed near the pharmacy with directions to prevent individuals from entering the pharmacy unless they had a prescription and with directions to prevent the selling of medication in the lobby.

Defendants Suarez and Green challenge their convictions on the grounds that as individuals subject to registration under the Controlled Substances Act, they are not subject to conviction under 21 U.S.C. § 841(a) which was the basis for the indictment. *United States* v. *Moore*, 505 F.2d 426 (D.C. Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (U.S. Feb. 18, 1975). Furthermore, all the defendants argue that the indictment in the present case is dependent on a regulation that was promulgated without authority and that impermissibly expands the range of proscribed activities beyond what the statute itself makes criminal. Finally, defendant Fort raises a sufficiency of the evidence claim.

II

In 74-1468 [10] the defendant is Pay Ming Leu, a physician who practiced medicine on Chicago's west side. Dr. Leu was charged in an indictment returned in April 1974. Counts 1-11 charged that he knowingly and intentionally dispensed Schedule II and III controlled substances pursuant to prescriptions not written in the course of professional practice in violation of 21 U.S.C. § 841(a)(1), and Counts 12-30 charged that he knowingly and intentionally

[10] No. 74-1420 was an appeal from the district judge's denial of bond pending appeal. An emergency motion by the defendant requesting injunctive relief was denied by this court on May 29, 1974.

attempted to dispense Schedule II and III controlled substances pursuant to prescriptions not written in the course of professional practice in violation of 21 U.S.C. §§ 841 (a)(1), 846. Dr. Leu was found not guilty of Counts 1-11 (dispensing) and guilty of Counts 12-30 (attempting to dispense). He was sentenced to five consecutive one year prison terms [11] which are the subject of this appeal.

The primary evidence against Dr. Leu was the testimony of three agents of the Drug Enforcement Administration and one agent from the Illinois Legislative Investigating Commission. These agents each described circumstances in which Dr. Leu sold them prescriptions for controlled substances. Agent Ward testified that he went to Dr. Leu for the first time on April 19, 1973 and asked to buy $100 worth of Ritalin. Dr. Leu said he could only give him a prescription for 90 pills. Five days later Ward asked for, but was refused another prescription for Ritalin because he was "too early," but after asking then instead for Seconal, he was given a prescription for a similar drug called Tuinal. Agent Ward returned thereafter and picked up other prescriptions. At no time was any physical examination given or a medical history taken.

Agent Adams testified that he told Dr. Leu that he was not kicking any habit, but just wanted to buy some Ritalin to get high. Dr. Leu then gave him a prescription for 90 pills in exchange for $20. On his next visit Adams received prescriptions for Ritalin and Seconal.

Agent Doyle went to Dr. Leu in September 1973, and explained that since July, when he had last seen Dr. Leu,

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[11] The sentence was subsequently modified because conviction under 21 U.S.C. §§ 841, 846 requires the imposition of a special parole term. This was set at three years.

he had been in Canada selling Methylphenidate (active ingredient in Ritalin). Dr. Leu wrote a prescription for Desoxyn in the name of Eddie DeGrazia (Doyle's undercover name) and although he would not write one for Ritalin to the same person, he did write one in another name, known by Dr. Leu not to be Doyle's real name. Agent Doyle told Dr. Leu that he never used Ritalin, but he just sold it to which the doctor replied: "Everybody has to make a living." Shortly thereafter Doyle asked for and received two 90 pill Ritalin prescriptions made out in the names of Ronald Henry and Thomas Sexton. A few days later Doyle purchased two more prescriptions under new names. He was at no time examined by Dr. Leu.

Agent Brown first visited Dr. Leu's office on April 19, 1973 and asked for and received a prescription in the name of Arnie Wilson for Ritalin and Seconal because he was having a party. Two weeks later he bought prescriptions in the name of Eddie Brown. Agent Brown subsequently returned and got prescriptions in the name of Bonnie Hill, Billy Brown, Lenora Brown, Lenora Wilson and Glen Gray. Brown had told Dr. Leu that he was selling the pills.

Dr. Leu challenges his conviction on the same grounds as the defendant-doctor in 74-1428. In addition, Dr. Leu argues that his conviction should be reversed on the grounds that certain instructions to the jury were erroneous; that the evidence was insufficient to make out an attempt case where the prescriptions were never filled; that certain expert opinion evidence invaded the province of the jury; and that there was excessive pretrial publicity and that the evidence was insufficient to sustain the conviction.

III

The principal issue raised by the defendant-physicians in both cases is that they are not subject to conviction under 21 U.S.C. § 841(a)(1) because of their status as registrants.[12] The thrust of defendants' argument is premised on Chief Judge Babelon's decision for a divided court in *United States* v. *Moore,* 505 F.2d 426 (D.C. Cir. 1974), *cert. granted,* 43 U.S.L.W. 3445 (U.S. Feb. 18, 1975). The court opined that Congress in enacting the Controlled Substances Act was distinguishing between the registrant and non-registrant in determining whether the penalty provisions of 21 U.S.C. §§ 842, 843 were to apply or the more severe sanctions of 21 U.S.C. § 841 were applicable. As the court said:

> In contrast to §§ 842 and 843, § 841 does not mention "registrants" as the focus of any of its provisions. It provides for sentences of up to 15 years and fines of up to $25,000. This broad outline strongly suggests that Congress intended to deal with registrants primarily through a system of administrative controls, relying on modest penalty provisions to enforce those controls, and reserving the severe penalties provided for in § 841 for those seeking to avoid regulation entirely by not registering.

Moore, supra at 430.

Prior to *Moore* it was unanimously held that physicians who were registrants could be liable under 21 U.S.C. § 841 if they prescribed controlled substances outside the course

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[12] It is not entirely clear from the record whether Green (pharmacist) is a registrant under the act. It would seem that 21 U.S.C. § 822 would require him to register in order to be able to lawfully distribute controlled substances. In any case because of our disposition of the *Moore* case issue, whether Green was registered or not becomes irrelevant.

of professional practice. *United States* v. *Larson,* slip op. No. 73-3109 (9th Cir., May 22, 1974); *United States* v. *Badia,* 490 F.2d 296 (1st Cir. 1973); *United States* v. *Jobe,* 487 F.2d 268 (10th Cir. 1973), *cert. denied,* 416 U.S. 955 (1974); *United States* v. *Leigh,* 487 F.2d 206 (5th Cir. 1973); *United States* v. *Bartee,* 479 F.2d 484 (10th Cir. 1973); *United States* v. *Collier,* 478 F.2d 268 (5th Cir. 1973).[13] For the following reasons we respectfully decline to follow the majority holding in *Moore* and we find ourselves instead persuaded by Judge MacKinnon's dissent and the earlier precedents.

We agree with the *Moore* majority that Congress in some respects intended to treat physician-registrants differently from non-registrants. We do not agree, however, that registrants were to be totally immune from the sanctions imposed by section 841. Insofar as registrants are guilty of technical violations (e.g., use of oral prescription when written one is required; dispensation of controlled substances for which he is not authorized to another registrant; distribution of controlled substances without the proper label; failure to keep proper records; distribution pursuant to an improper order form; use of improper registration number) in their day-to-day dealings with controlled substances in accordance with their professional responsibilities, they are liable only for the lesser penalties

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[13] The theories for finding physicians liable under 21 U.S.C. § 841 were varied. Thus, in *United States* v. *Leigh,* 487 F.2d 206 (5th Cir. 1973), the court held that an indictment charging "distributing" by a physician instead of "dispensing" was invalid, while in *United States* v. *Badia,* 490 F.2d 296 (1st Cir. 1973), the court held that a physician was guilty of "distributing" rather than "dispensing" because as a registrant he could only be "dispensing" if he was in fact acting within the course of professional practice.

of sections 842 and 843. When, however, a physician acts without any legitimate medical purpose and beyond the course of professional practice by selling prescriptions that allow the bearer to obtain controlled substances, his conduct should be treated like that of any street-corner pill-pusher.

Section 841 makes it "unlawful for *any* person . . . to distribute or dispense controlled substances. . . ." That prohibition is absolute unless otherwise "authorized by [the] subchapter." We deem it to be significant that the exception refers only to a distributing or dispensing that is authorized by the subchapter rather than a broader exception which would totally exempt all registrants.[14] Furthermore, the definition of the term dispense requires that a practitioner be involved either in delivering, ordering or prescribing a controlled substance. 21 U.S.C. § 802 (10). A practitioner is one registered or one otherwise permitted by the United States or a state to dispense or administer a controlled substance. 21 U.S.C. § 802(20). Thus, it is clear that when 21 U.S.C. § 841(a) refers to "dispense," it can only mean that physicians as well as other practitioners are subject to the sanctions of that section if their actions are not authorized by the subchapter.

There is another example of internal inconsistency that follows from a holding that section 841(a) does not apply to registered physicians. If a registrant distributed a controlled substance without using the proper order form or in any manner that violated 21 U.S.C. § 843 (technical violations including use of fictitious registration number; acquisition of controlled substances through misrepresenta-

[14] The question of what types of distributions and dispensations are authorized is discussed *infra*.

tion; furnishing false information on documents required to be kept or filed and making of equipment designed to reproduce drug trade names fraudulently) he could receive up to four years imprisonment for an initial violation. A violation of the type charged in these cases, selling of prescriptions without a legitimate medical purpose, would, according to the *Moore* theory, be cognizable only under 21 U.S.C. § 842 (since section 841 would be unavailable and the charge is not covered by section 843). A violation of section 842 carries only a one year imprisonment term for initial violations. This would mean that a physician who knowingly wrote prescriptions to anyone on demand would receive at most a one year sentence, while his colleague who failed to use a proper order form could receive up to four years imprisonment. We do not believe that Congress intended such a result.

Furthermore, our judgment is supported by looking closely at section 842(a)(1), the section *Moore* would rely on for this action in lieu of section 841. Section 842(a)(1) makes it unlawful for a registrant to dispense a controlled substance in violation of 21 U.S.C. § 829. Section 829 refers to the situations when a physician is required to use either a written or oral prescription, and directs the form that the prescription is to take. It does not specifically deal with the problem of the issuance of prescriptions without any medical justification. The fact that section 842(a)(1) may have been violated by the defendant-physicians[15] does not preclude the possibility that they are liable under another section carrying more severe sanctions.

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[15] *See Moore, supra,* 505 F.2d at 452 n.10 (MacKinnon, J. dissenting).

Finally, the legislative history of the Controlled Substances Act substantiates our position. The present Act replaced the Harrison Narcotics Act of 1914, 38 Stat. 785 (1914), the prohibitions of which (against dispensing narcotics) were applied to registered physicians who acted beyond the course of their professional practice. *United States v. Behrman,* 258 U.S. 280 (1922); *Jin Fuey Moy* v. *United States,* 254 U.S. 189 (1920); *United States* v. *Doremus,* 249 U.S. 86 (1919).

We have neither been directed to nor have we discovered a substantial basis in the legislative history that convinces us that physicians were not to be liable under section 841 as they were under the Harrison Act for dispensing controlled substances outside the course of their professional practice. While it is true to some degree that the Harrison Act was thought inadequate with regard to defining precisely the liability of physicians,[16] this goal

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[16] As quoted from the Prettyman Commission of 1963 in the House Report accompanying the Controlled Substances Act:

> Since the passage of the Harrison Act of 1914, the Federal narcotics laws have expressly permitted a physician to prescribe narcotic drugs for a patient in the course of "professional practice only" and for "legitimate medical uses" and "legitimate medical purposes." Under this statutory language there is no doubt that a physician may prescribe narcotic drugs for a papatient suffering acute pain or from a painful and incurable disease. But a controversy has existed for 50 years over the extent to which narcotic drugs may be administered to an addict solely because he is an addict.
>
> During the first 10 years following enactment of the Harrison Act, the Supreme Court affirmed several convictions under the act involving the indiscriminate prescribing of narcotic drugs for addicts. In 1925, however, in *Linder* v. *United States,* 45

(Footnote continued)

was accomplished in the Controlled Substances Act through the gradations of sanctions provided by sections 841-843 and by empowering the Attorney General to promulgate regulations to define more precisely what constitutes authorized dispensing. 21 U.S.C. §§ 821, 871(b).[17]

(Footnote continued)

S. Ct. 446, 268 U.S. 5, 69 L.Ed. 819, the Court indicated that the dispensing of narcotic drugs by a physician for the purpose of relieving conditions incident to addiction was not in every instance a violation of the act. . . .

The regulations of the Bureau of Narcotics, however, do not seem to be in accord with [Linder]. . . .

The practicing physician has thus been confused as to when he may prescribe narcotic drugs for an addict. Out of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts except occasionally in a withdrawal regimen lasting no longer than a few weeks. In most instances they shun addicts as patients.

H.R. REP. No. 91-1444, 91st Cong., 2d Sess., U.S. CODE, CONG. & ADMIN. NEWS 4566, 4580 (1970).

[17] As stated by the House Report accompanying the Act:

Although the committee is concerned about the appropriateness of having Federal officials determine the appropriate method of practice of medicine, it is necessary to recognize that for the last 50 years this is precisely what has happened, through criminal prosecution of physicians whose methods of prescribing narcotic drugs have not conformed to the opinions of Federal prosecutors of what constitutes appropriate methods of professional practice. In view of this situation, this section will provide guidelines, determined by the principal health agency of the Federal Government, after consultation with appropriate national professional organizations. Those physicians who comply with the recommendations made by the Secretary will no longer jeopardize their professional careers by accepting narcotic addicts as patients.

H.R. REP. No. 91-1444, 91st Cong., 2d SESS., U.S. CODE, CONG. & ADMIN. NEWS 4566, 4581 (1970).

It was not accomplished, as the *Moore* court holds, by exempting physicians from the sanctions of section 841.

The language in the legislative history relied on by the *Moore* court to conclude that physicians were not to be included within the coverage of section 841 is in our view too general to justify that conclusion. The congressional purpose behind section 841 was to get the drug dealer no matter who he might be, and to prevent diversion of legitimately produced controlled substances into illicit channels.[18] One of the major sources of this illicit diversion is from registrants who have relatively easy access to controlled substances. Certainly Congress did not intend to immunize such individuals from prosecution under section 841.

We hold that section 841 does not exclude physicians from its coverage.

IV

It is next necessary to consider precisely what type of dispensing or distributing is authorized by the exception clause of section 841. All the defendants in both consolidated appeals argue that charges against them are

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[18] The House Report accompanying the Act stated:

> With regard to the stimulant and depressant drugs, now regulated under the Federal Food, Drug, and Cosmetic Act as amended by the Drug Abuse Control Amendments of 1965 and in 1968, it should be noted that as estimated in a report by this committee in March of 1965 on the Drug Abuse Control Amendments of 1965, almost 50 percent of the 9 billion amphetamines and barbiturates produced legitimately in this country were diverted into illicit channels. As of late 1969, when that diversion figure was rechecked, it was still accurate.

H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., U.S. Code, Cong. & Admin. News 4566, 4581 (1970).

based on an invalidly promulgated regulation that expands too broadly the conduct considered impermissible under section 841. The challenged regulation is 21 C.F.R. § 306.04(a) which provides that a prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice. The phrase "legitimate medical purpose" is not used in section 841(a) but is used in the indictments, and that discrepancy is the basis of the defendants' challenge.

In our view, the challenged regulation has been validly enacted and does not expand the criminal statute. Section 841(a)(1) makes it unlawful to dispense or distribute controlled substances "except as authorized by this subchapter." 21 U.S.C. § 822(b) provides that registrants are allowed to dispense controlled substances "to the extent authorized by their registration and in conformity with the other provisions of this subchapter." Two of the provisions of the subchapter are 21 U.S.C. § 821 and § 871(b). Section 821 provides that "[t]he Attorney General is authorized to promulgate rules and regulations . . . relating to the . . . control of the . . . distribution and dispensing of controlled substances." Similarly, section 871(b) provides that "[t]he Attorney General may promulgate . . . regulations . . . for the efficient execution of his functions under this subchapter." It is pursuant to that authority that 21 C.F.R. § 306.04(a) was promulgated. Thus, it is clear that the prescriptions involved in the present cases were not effective because they were not issued for a legitimate medical purpose. The exemption from section 841(a) is applicable only if the action of the practitioners is authorized. Since there was no lawful prescription ever written, it follows that section 829 has

not been complied with[19] and the dispensing of the controlled substances in these cases has not been authorized. This interpretation does not expand the meaning of section 841(a), but rather seeks to define the exemption clause of that section.[20]

Although it is probably true that more precise regulations are desirable as to what physicians may or may not do with respect to the exception clause of section 841(a), the present cases are not of the border line variety which had in part motivated Congress to abandon the Harrison Act and enact the Controlled Substances Act.[21] In the present cases there were wholesale sales of prescriptions without even the pretense of a legitimate medical purpose or standard medical procedures. Under these circum-

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[19] It is true that section 842 provides penalties for registrants who fail to comply with section 829. This, however, refers to specific technical violations of section 829 and of 21 U.S.C. § 353(b) which is incorporated by reference in section 829. We believe that where a prescription is void, as 21 C.F.R. § 306.04(a) provides, that the appropriate section to be applied is 841.

[20] Even without reference to the regulation the government has sustained its burden in these cases. Section 841(a) makes it illegal to dispense controlled substances except as authorized. The term dispense is defined so as to include the prescribing of a controlled substance by a practitioner which is defined to include a registrant (physician or pharmacist) who acts within the course of professional practice, 21 U.S.C. § 802(10), (20). Since the wholesale selling of prescriptions for controlled substances is beyond the scope of professional practice, a physician (or pharmacist who participates in such a scheme) is not acting as a practitioner. Thus, if such an individual's actions are not that of a practitioner they are not authorized under the subchapter and the exception clause of section 841 does not apply.

[21] *See* note 17, *supra*.

stances we find no merit in the defendant's claims that the regulation expanded what was criminal beyond the congressional statute.

V

The defendant Fort in 74-1435, owner of the building that housed the medical center and the Afro-American Pharmacy, challenges his conviction on sufficiency of the evidence grounds. We have reviewed the evidence and find that in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *United States* v. *Esquer,* 459 F.2d 431, 433 (7th Cir. 1972), *cert. denied,* 414 U.S. 1006 (1973), that a sufficient basis exists in the record upon which the jury could reasonably conclude that the defendant Fort had participated in a conspiracy with Dr. Suarez and Green to violate section 841(a).

While the evidence against Fort is not overwhelming, there was sufficient testimony tying him to the prescription sales operation. He was fully aware of the 15 day rule and its operation. He knew that there were exceptions to the rule and that one of these exceptions was Lorenzo Bliss, whom Fort knew personally. Furthermore, Fort not only knew of the direct telephone link-up between the medical clinic and pharmacy, but he expressed disappointment that Dr. Suarez was not making greater use of the line in order that clinic patients would be forced to come to Fort's pharmacy. In addition, Helen Basie testified that to her comment that there were too many people in the clinic and that it could not be possible for that many people to be coming to see this doctor with the same illness and getting the same medication, Fort replied, "Yes, he's getting out of hand."

Other evidence pointing to Fort's involvement in the conspiracy included the fact that Fort had hired security guards for the first and eighth floors. The guards were instructed to make sure that patients did not sell medication in the building. In addition, it was shown that the pharmacy had bought over 1,000,000 Ritalin tablets in an eleven month period, and that on occasion Fort ordered and picked up these supplies. From all this evidence the jury could reasonably conclude that Fort was not a passive part-owner of a pharmacy involved in illegal distribution of controlled substances, but that he knew of and was involved in a concerted effort to violate section 841(a).

VI

The defendant Dr. Leu in addition to the challenges already considered and rejected raises a number of other claims.

A

The defendant contends that the jury instruction on what constituted a defense by a physician to an action under section 841(a) should have been broader than "if the substance is prescribed by him in good faith in medically treating a patient."[22] Initially, the defendant asked

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[22] The instruction given read:

> Federal law authorizes a licensed physician to prescribe controlled substances of the kinds charged in the indictment, if the drug is prescribed in the course of the physician's professional practice.
>
> The defendant Pay Ming Leu is a licensed physician. It is therefore a defense to the charges in this indictment that the

(Footnote continued)

for an instruction that would have established a defense on the mere showing that a controlled substance was prescribed by a physician for his patient's own use.

As the district judge correctly observed, the defendant's proffered instruction was too broad and would have taken the heart out of the government's case. The defendant's instruction would have the effect of applying the *Moore* rationale. We have decided that a prescription issued by a physician that is so far removed from a physician's professional responsibilities (i.e. more than mere technical violations of his authorization) violates section 841(a). The "good faith medical treatment" instruction seems

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(Footnote continued)

controlled substances were prescribed by him in the course of his professional practice.

A controlled substance is prescribed by a physician in the course of his professional practice, and therefore lawfully, if the substance is prescribed by him in good faith in medically treating a patient.

In order to determine whether or not a prescription or prescriptions were issued in the course of a defendant physician's professional practice, you may consider all of the evidence of circumstances surrounding the prescribing of the substance in question, the statements of the parties to the prescription transaction, any expert testimony as to what is the usual course of medical practice, and any other competent evidence bearing on the purpose for which the substances in question were prescribed.

Unless you find beyond a reasonable doubt that an act of prescribing charged in the indictment against a physician defendant was not done by the defendant physician in the course of his professional practice, then you should find him not guilty.

to be an accurate reflection of this holding and in no way was prejudicial to the defendant's case.[23]

B

Defendant Leu was found not guilty of eleven substantive counts, but found guilty of the remaining counts all charging him with attempt to dispense. It is uncontroverted that the prescriptions written by the defendant that form the basis for Counts 12-30 were never filled. Even assuming that a prescription must be filled to complete the crime of dispensing a controlled substance as defined by section 841(a), it seems to us clear that a prescription need not be filled to make out a case of attempting to dispense against a physician.

We have previously determined that a physician's authorization which gives rise to an exemption from section 841(a) liability, does not cover the writing of prescriptions outside the course of one's professional practice. In the present case the proof shows that the defendant wrote and sold prescriptions to individuals outside the scope of his professional duties. When this occurred the defendant-physician had completed all the elements

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[23] The defendant also objects to an instruction given by the district judge that defined not only Schedule II and III controlled substances (the basis of the indictment) but also Schedule I substances (not involved in the indictment). The purpose of giving the definition of a Schedule I substance (high potential for abuse and no currently accepted medical use) was because the definition of Schedule I is referred to in the definition of Schedule III. It is clear that the defendant was not prejudiced by this instruction. The instruction as given was an accurate statement of the law as set out in 21 U.S.C. § 812 and the judge not only informed the jury why he was reading them the definition of Schedule I substances, but also advised them that this case involved no such substances.

of the offense that he would ever commit and that were within his control. As far as Dr. Leu was concerned, the crime had been completed. If for some reason it was not in actuality completed, it was because of "factual" and not "legal" impossibility, and therefore not a sufficient defense to an attempt charge. *United States* v. *Heng Awkak Roman,* 356 F. Supp. 434 (S.D.N.Y.), *aff'd,* 484 F.2d 1271 (2d Cir. 1973), *cert. denied,* 415 U.S. 978 (1974). This is not a case of "mere preparation" but rather one of attempt to commit the crime of dispensing. Here we have "the commission of an overt act, the 'doing something directly moving toward, and bringing him nearer the crime he intends to commit.' " *United States* v. *Noreikis,* 481 F.2d 1177, 1181 (7th Cir. 1973). As the court said in *United States* v. *Mandujano,* 499 F.2d 370 (5th Cir. 1974):

> First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. . . .
>
> Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.

Id. at 376.

The foregoing test was clearly met in this case.[24]

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[24] As an offshoot to this argument the defendant argues that since the jury found him not guilty of Counts 1-11, and that at least some of the elements involved in these acquittals were involved in the remaining attempt counts, that the verdicts are inconsistent.

(Footnote continued)

C

The defendant complains that the expert testimony of Dr. Howard D. Kurland as to customary procedures followed by licensed medical physicians in treating a new patient prior to prescribing a controlled substance as medication invaded the province of the jury.

While it may be true that an expert should not be allowed to express a conclusion upon the ultimate issue of fact to be decided by the jury, *United States* v. *Spaulding*, 293 U.S. 498 (1935), the testimony of Dr. Kurland in the present case was entirely proper. Here Dr. Kurland merely testified as to what customary medical procedure was generally followed before the prescribing of drugs. He did not comment on whether the procedures followed by the defendant were appropriate, given the individual nature of his patients' conditions. That question was properly left for the jury's determination. Testimony as to the traditional procedures and techniques to be followed by a physician in a given set of circumstances is entirely permissible by a witness who is qualified as an expert in the medical field. *United States* v. *Bartee*, 479 F.2d 484, 488

(Footnote continued)

Merely because inconsistent verdicts are rendered does not necessarily require a reversal. *United States* v. *Greene*, 497 F.2d 1068 (7th Cir. 1974). In this case, however, the verdicts are not inconsistent. The attempt counts charge the defendant Leu with selling of prescriptions on entirely different occasions than do the first eleven substantive counts. Furthermore, as compared to the first elevent counts the proof on the attempt counts showed more dramatically that no legitimate medical purpose was involved (i.e. more frequent intervals and wholesale use of fictitious names).

(10th Cir. 1973); *Heller* v. *United States,* 104 F.2d 446, 449 (4th Cir. 1939).

In addition, the trial judge gave LaBuy instruction 6.16-1 which advised the jury that an expert's opinion need not be accepted by them. We conclude, therefore, that the defendant has shown no prejudice caused by the admission of Dr. Kurland's testimony.

D

Dr. Leu further contends that he was denied a fair trial because of adverse pre-trial publicity. The defendant claims that news stories reporting his indictment and the trial of Dr. Suarez served to prejudice him. We note that most of the stories complained of were published or broadcast five months before defendant's trial, and accounts of Dr. Suarez' trial were published approximately six weeks before the start of Dr. Leu's trial.[25] At the voir dire it was established that the jurors had never heard of Dr. Leu or anything about this case. In addition, at the close of the evidence the jury was instructed to consider only the evidence presented in the courtroom and to disregard any press, television or radio reports they might have seen or heard. Considering the specific facts of this case, the intensity of the exposure and the nature of the publicity, we conclude that the publicity attendant with this trial was minimal and clearly does not warrant

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[25] The fact that Dr. Suarez was sentenced during the trial of Dr. Leu does not establish substantial prejudice. Indeed, except for the bald assertion that the Suarez sentencing coincided with the Leu trial, the court's attention is not directed to any specific articles or broadcasts that contain anything more than a bare reporting of the facts.

either a reversal or remand. *United States* v. *Barrett*, 505 F.2d 1091, 1100 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3438 (U.S. Feb. 11, 1975).

E

Finally, we have examined defendant Leu's sufficiency of the evidence argument and we find it without merit. As the facts summarized in part II, *supra*, indicate, there was clearly a sufficient basis to support the jury's verdict.

We have examined all of the defendant's other contentions of error and find them unpersuasive.

For the foregoing reasons the judgments of the district court in both cases are affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

OPINION BY JUDGE SPRECHER

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 27, 1975

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

No. 74-1420, 74-1428, 74-1433, 74-1435, 74-1468

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CLIFFORD T. GREEN, VALERIANO SUAREZ and HENRY G. FORT, PAY MING LEU,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1233

CLIFFORD T. GREEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner Suarez, a physician registered under the Controlled Substances Act, contends that as a registrant he is immune from prosecution under the principal felony provision of the Act, 21 U.S.C. 841(a)(1); petitioner Green, a licensed pharmacist, contends that pharmacists are exempt from the reach of the same section when they dispense drugs pursuant to facially valid prescriptions; petitioner Fort challenges the sufficiency of the evidence to support his conspiracy conviction; each of the petitioners contends that 21 C.F.R. 306.04(a), which they were also charged with violating, impermissibly expands the scope of conduct proscribed by 21 U.S.C. 841(a)(1).

Petitioners Suarez and Green were charged in the United States District Court for the Northern District of Illinois with multiple counts of dispensing or distributing controlled substances outside the course of their professional prac-

tice, in violation of 21 U.S.C. 841(a)(1) and 21 C.F.R. 306.04(a);[1] each of the petitioners was charged with conspiracy to violate 21 U.S.C. 841(a)(1) and 21 C.F.R. 306.04(a), contrary to 21 U.S.C. 846. A jury convicted petitioner Suarez of conspiracy and of 17 substantive counts, petitioner Green of conspiracy and 10 substantive counts, and petitioner Fort of conspiracy. Suarez was sentenced to five years' imprisonment, Green to three years and Fort to one year. In addition, all were given special parole terms of two years. The court of appeals affirmed (Pet. App. 1-25).

The evidence at trial established that petitioners, working from a medical clinic and pharmacy located across the hall from one another on the eighth floor of a building owned by petitioner Fort, systematically distributed controlled substances for profit and without any medical justification. Petitioners Fort and Green were co-owners of the pharmacy. According to the testimony of government witnesses, "patients" would come to the clinic, receive minimal, if any, medical treatment,[2] and would be given upon request one or more prescriptions either in their own or in a fictitious name for various schedule II

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[1]21 U.S.C. 841(a)(1) provides in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to * * * distribute, or dispense * * * a controlled substance * * *.

21 C.F.R. 306.04(a) (now 21 C.F.R. 1306.04(a) (1974 ed.)) provides in pertinent part:

> A prescription for a controlled substance * * * must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. * * *

[2]Petitioner Suarez conducted no genuine physical examinations (Tr. 750, 812, 924, 988, 1136-1137). Indeed, Jackie Hunter, who worked in the clinic as receptionist and office manager for well over a year, testified that except on one or two occasions she never saw Suarez give a patient an examination of any sort (Tr. 434).

and III controlled substances.[3] They were then routed to the pharmacy across the hall,[4] where petitioner Green filled their prescriptions without inquiry. While the clinic had a "15 day rule," which prohibited revisits more than once every fifteen days, there were also "preferred patients" who came as often as they wished and were permitted to purchase multiple prescriptions for the same drug (Tr. 452-464, 506-514).[5] These "preferred patients" were the primary recipients of the prescriptions issued in fictitious names—names that included "Lana Turner," "Mark Twain," "Ralph Nader" and the like (Govt. Group Exh. 425). Petitioner Green filled these prescriptions as a matter of course. On one occasion, however, he was overheard cautioning Suarez about giving too many prescriptions to a man whom Suarez had previously suspected of being an undercover agent (Tr. 517-518).

Because of petitioner Green's complaint that a pharmacy across the street was filling some of the prescriptions written by petitioner Suarez, a private telephone line was eventually installed linking the clinic with Green's pharmacy (Tr. 528-529). Green had suggested that Suarez telephone in the prescriptions, thus forcing patients to come to his pharmacy, and that at the end of the day Suarez

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[3]These included ritalin, desbutal, doriden and tuinal.

[4]Several witnesses described the circular pattern that "patients" would follow—entering the clinic by the front entrance and leaving by the back door, where they were then directly opposite the front door of the pharmacy (*e.g.*, Tr. 426-430, 750-751, 3551-3553).

[5]One "preferred patient," Lorenzo Bliss, would occasionally call the clinic in advance and say, for example, that he was bringing 20 "children" with him; that meant that he wanted 20 groups of prescriptions (a "group" or "set" would include a prescription for an "upper" such as ritalin and for a "downer" such as doriden) for which he paid $10 a set or a total of $200 (Tr. 499). Non-preferred patients were charged $10 a visit (Pet. App. 5).

could simply transfer the written prescriptions. Petitioner Fort later expressed disappointment that Suarez was not making greater use of this private line (Tr. 530).

Fort, besides owning the building and a one-half interest in the pharmacy, was involved in the administration of the pharmacy (Tr. 2010-2012) and also appeared frequently in the clinic. He was aware of the "15-day rule" and its exceptions; one "preferred patient," Lorenzo Bliss (see n. 5, *supra*), frequently entered the pharmacy carrying a brief case and went into the back room to talk with Green and Fort (Tr. 1276). Fort had posted a security guard in the building to prevent the resale of medication and to ensure that no one entered the pharmacy without a prescription (Tr. 3546-3548).[6] Like petitioner Green, Fort at one point became apprehensive about Suarez' methods: When one of the pharmacy employees, noting the large numbers of people waiting their turn in the hallway outside the clinic, commented that it was not possible for them all to have the same illness and to be receiving the same medication, Fort replied that Suarez was "getting out of hand" (Tr. 1281-1282).

1. Petitioner Suarez' contention that, as a physician registered under the Controlled Substances Act, he is immune from prosecution under 21 U.S.C. 841(a)(1) is presently before this Court in *United States* v. *Moore*, No. 74-759, certiorari granted, February 18, 1975. Accordingly, we suggest that the petition in the instant case be held pending a decision in *Moore*.[7]

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[6]The efforts to prevent resale of medication were apparently limited to the lobby of the building; upstairs in the reception room of the clinic individuals freely purchased, sold and traded prescriptions (Tr. 757-759).

[7]We are sending a copy of our brief in *Moore* to petitioner's counsel.

2. Petitioner Green contends (Pet. 8) that "*Moore* is not directly applicable to pharmacists" and therefore that the decision in that case will not be dispositive of his case. He notes that the Controlled Substances Act distinguishes both definitionally and for purposes of registration between a "pharmacy" and a "pharmacist." Thus, Section 802(20) includes a "pharmacy" but not a "pharmacist" within the definition of a "practitioner" (that is, one authorized under the Act to "dispense * * * a controlled substance in the course of professional practice * * *"). Section 822(c)(1) in turn exempts the individual pharmacist—as distinct from a pharmacy—from the requirement of registration under the Act[8] and authorizes his possession of controlled substances if he "is acting in the usual course of his business or employment." Petitioner Green argues upon this basis that—even assuming registrant-practitioners are authorized to dispense only "in the course of professional practice" and may be prosecuted when they dispense for non-medical purposes—he is neither a registrant nor a practitioner, and his authorization is not limited by the same standard; rather, his conduct is "in the usual course of his business or employment," and is thus lawful, if he dispenses pursuant to prescriptions that are valid on their face.

Nothing in the Controlled Substances Act or its legislative history suggests that the purpose for which a pharmacist dispenses medication is any less relevant to the scope of his exemption from prosecution under Section 841 than the purpose for which a physician dispenses

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[8]21 C.F.R. 1301.24 (1974 ed.) confirms that "a pharmacist employed by a pharmacy need not be registered individually to fill a prescription for controlled substances if a pharmacy is so registered."

is relevant to his authorization.[9] The "usual course" of a pharmacist's business or employment is the dispensing of drugs "in the course of professional practice," not the indiscriminate filling of prescriptions "valid on their face" with knowledge that they were issued for non-medical purposes. In the instant case, the evidence was overwhelming that Green knew of and subscribed to the illicit purpose for which Suarez was issuing prescriptions. Thus, if Suarez became liable under Section 841 when he dispensed outside the course of professional practice—the issue controlled by *Moore*—then Green is similarly liable. Accordingly, disposition of this contention should be deferred pending a decision in *Moore*.

3. Petitioners' contention that 21 C.F.R. 306.04(a), which they were also charged with violating, invalidly expands the range of activities proscribed by 21 U.S.C. 841(a)(1) is without substance. They contend that while "the statutory language ['in the course of professional practice,' 21 U.S.C. 802(20)] only requires that the doctor be acting as a doctor in dispensing the prescriptions, the regulatory language ['for a legitimate medical purpose'] requires that the prescriptions be for drugs which are accepted

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[9]The legislative history suggests that the distinction by Congress between "pharmacy" and "pharmacist" was primarily a concession to the retail drug industry stemming from administrative considerations. A chain drug store spokesman, for example, had told the Senate Judiciary Committee that "[i]f, under the proposed legislation, each pharmacist were required to register to dispense * * * drugs, chaos could result in [drug stores with two or three pharmacists]. * * * [T]hree individuals['] registry numbers would appear on invoices as they came in, and on prescriptions as they were dispensed. The objective of greater inventory control would be jeopardized by a mounting log of transfers and inventory changes." Hearings on S. 1895 before a Subcommittee of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 552 (1969).

medically for treatment of the particular ailment" (Pet. 9). The evidence at trial established conclusively, however, that Suarez was not prescribing drugs "in the course of [his] professional practice"—indeed, it showed that he was not acting as a medical doctor at all but as a drug pusher. Suarez' activities in this regard were carried on with knowledge by and the active participation of petitioners Green and Fort. Thus, any arguable expansion[10] of the statutory standard effected by the regulation had no relevance to petitioners. As the court of appeals concluded (Pet. App. 17-18):

> Although it is probably true that more precise regulations are desirable as to what physicians may or may not do with respect to the exception clause of section 841(a), the present cases are not of the border line variety which had in part motivated Conggress to abandon the Harrison Act and enact the Controlled Substances Act. In the present cases there were wholesale sales of prescriptions without even the pretense of a legitimate medical purpose or standard medical procedures. Under these circumstances we find no merit in the defendant's claims that the regulation expanded what was criminal beyond the congressional statute.

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[10]Faced with a similar contention that the phrases "for any legitimate medical research purposes" and "in the usual couse of professional practice" have different meanings, the Ninth Circuit has said: "The two phrases * * * have essentially the same meaning. * * * The [statutory] language clearly means that a doctor is not exempt from the statute when he takes actions that he does not in good faith believe are for legitimate medical purposes." *United States* v. *Rosenberg*, C.A. 9, No. 74-2197, decided March 31, 1975, petition for a writ of certiorari pending, No. 74-1367 (slip op. 10-11). Moreover, as the *Rosenberg* court pointed out (slip op. at 11, n. 11), prior cases of this Court involving the liability of physicians and druggists under the Harrison Narcotics Act uniformly defined the statutory phrase ("in the course of professional practice only") as meaning prescribing or dispensing for a bona fide medical purpose. See, *e.g.*, *Linder* v. *United States*, 268 U.S. 5, 18.

4. Petitioner Fort's claim that the evidence did not support his conspiracy conviction was correctly rejected by the court of appeals as follows (Pet. App. 18):

> While the evidence against Fort is not overwhelming, there was sufficient testimony tying him to the prescription sales operation. He was fully aware of the 15 day rule and its operation. He knew that there were exceptions to the rule and that one of these exceptions was Lorenzo Bliss, whom Fort knew personally. Furthermore, Fort not only knew of the direct telephone link-up between the medical clinic and pharmacy, but he expressed disappointment that Dr. Suarez was not making greater use of the line in order that clinic patients would be forced to come to Fort's pharmacy. In addition, Helen Basie testifed that to her comment that there were too many people in the clinic and that it could not be possible for that many people to be coming to see this doctor with the same illness and getting the same medication, Fort replied, "Yes, he's getting out of hand."

The court went on to note Fort's role in hiring a security guard to ensure that patients did not sell their medication in the building. He was also actively involved in ordering and picking up supplies for the pharmacy, which included the purchase of more than 1,000,000 ritalin tablets alone in an eleven-month period. The court concluded (Pet. App. 19):

> From all this evidence the jury could reasonably conclude that Fort was not a passive part-owner of a pharmacy involved in illegal distribution of controlled substances, but that he knew of and was involved in a concerted effort to violate section 841(a).

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Moore*, and then disposed of in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.